



**JULY 2019  
EXAMINATION ANSWERS**

**APPLICANT'S ANSWERS TO QUESTIONS  
NEVADA BOARD OF BAR EXAMINERS**

**QUESTION 1**

### Exam Information

Exam Date:

7/2019

Exam Name:

Question 1

\*\*\*\*\* **Question 1 STARTS HERE** \*\*\*\*\*

### ***Competence***

A lawyer has a duty of competence to be skillful, knowledgeable, and thorough. If a lawyer is not competent in a matter, she must take steps to become competent. These steps can include things such as research or working with another attorney (with a client's consent).

Here, Nancy is a Nevada licensed lawyer, however, she has only had one law job at a Big Law Firm where she practiced solely as a probate lawyer. She has since opened her own law firm and has reached out to real estate clients--clients with whom she has no prior experience. Although Nancy has partnered with Sandra, a real estate broker (which has its own problems, discussed below), the facts only indicate that Nancy was confident she could handle real estate transactions with Sandra's help, rather than being confident on her own.

Nancy has breached her duty of competence by taking on her first client Corey if she has not taken any other steps other than working with Sandra to become competent in real estate law.

### ***Solicitation***

A lawyer may not solicit clients. solicitation includes reaching out directly to a potential client and offering to work for the client without clearly indicating that the communication is an advertisement. A lawyer may solicit business from clients with whom the attorney has had a previous lawyer-client relationship.

Here, Nancy has breached the Nevada Rules of Professional Conduct (RPC) by reaching out to certain real estate clients of Big Law Firm to ask for their business. Although Nancy previously worked for the law firm that represented these real estate clients, because she worked in probate, she did not herself represent these clients, making her solicitation of their business improper. Nancy did nothing to indicate that she was merely advertising. Rather she reached out to these individuals directly over the phone.

Nancy has breached the RPC by soliciting clients.

### ***Going in to business with non-lawyers***

A lawyer may not go into business with a nonlawyer unless the lawyer advises the nonlawyer to get separate representation and the lawyer explains all the risks in going into business. The lawyer must also get the nonlawyer's consent, confirmed in writing to go into the business. The terms must be fair and clearly written out such that the nonlawyer can understand them.

Here, Nancy has gone into business with Sandra, offering her a free space in Nancy's new office in exchange for Sandra helping Nancy prepare real estate documents. Nancy formed a professional corporation with Sandra and elected themselves as corporate officers (discussed below). Although this might be a fair exchange, there is no indication that Nancy requested that Sandra get her own representation or that Nancy spelled out the terms in a document (other than perhaps the articles of incorporation). Nancy did not explain the risks of going into business nor did she obtain Sandra's informed consent.

Nancy has breached the RPC by going into business with a nonlawyer without following the steps of obtaining informed consent.

### ***Corporations***

Professional corporations are particular corporations reserved for professionals such as lawyers. Nevada requires that these corporations register with the secretary of state and include at least one party's name in the company name and an indication (such as "PC") that the corporation is a professional corporation. These corporations limit liability for the partners, although the partners remain liable for their own torts and the corporation is liable for the malpractice of the professionals. A lawyer may not form a professional corporation with a nonlawyer. Lawyers and nonlawyers may not split fees.

Here, Nancy has created a professional corporation with a non-lawyer. Not only is this impermissible under the RPC, this is misleading because most individuals expect law firms to be comprised of lawyers, rather than lawyer and nonlawyer partners. By electing both of them as corporate officers, Nancy has breached the RPC by doing business with a nonlawyer and creating a corporation where fees will be split between a lawyer and a nonlawyer (discussed in more depth later) .

### ***Advertisements/specializations***

Advertisements must be truthful and must not be misleading. Advertisements must follow strict requirements and must be approved by the state bar. If an advertisement includes a specialization, the attorney must actually be certified in that specialization by the state bar or the certifying agency. Any claims made in the advertisement must be verifiable. Advertisements must be clearly marked as such.

Here, Nancy has advertised in the local paper, stating that her new practice offers the best rates in town and specializes in real estate transactions. Nancy does not specialize in real estate and her association with Sandra does not create a specialization. She has no training in the practice and has worked solely as a probate lawyer for her entire legal career. Stating that her law firm offers the best rates in town is also likely not verifiable because rates depend on so many factors and can vary widely. Finally, there is no indication that her advertisement was marked with the required indicators such as red ink or a large font.

Nancy has violated the RPC by advertising falsely and in a misleading manner.

### ***Forming the lawyer client relationship***

A lawyer client relationship is formed when the client indicates her desire to enter into a lawyer client relationship and the lawyer consents or fails to tell the client that there is not a lawyer client relationship, but knows or should know that the client is relying on the attorney.

Here, Corey engaged Nancy to help him purchase a small apartment building in Las Vegas. Corey gave Nancy a draft purchase agreement, told her that the closing would be in two weeks, and Nancy agreed to take the matter.

Nancy and Corey have formed a lawyer client relationship.

### ***Former client conflicts***

A lawyer may not represent a client who is adverse to a former client in a same or substantially related matter unless the lawyer receives informed consent confirmed in writing from the former client and the lawyer does not use any information gained during the representation to disadvantage the former client. A lawyer must only take on a representation with a conflict if she reasonably believes that the conflict will not materially impact her representation.

Here, the seller of the apartment building is a former client of Big Law Firm, the law firm from which Nancy moved. Although the purchase agreement was drafted by a different law firm, Nancy still has information regarding the client from her time at Big Law Firm. Although Nancy did not practice in the real estate division in her probate practice, she likely had some exposure to the practice because

probate involves real estate and she obviously recognized the client. It is unclear whether this is a "substantially related matter" to one which Nancy worked on, however it could very likely be because she remembers that the apartment had mold problems. Nancy cannot work on the case unless she receives informed consent confirmed in writing from the seller and does not use her knowledge of the mold problems against the seller. However it is unlikely that she will not be able to use that information. Thus she should have told Corey that she could not represent him upon recognizing the conflict. It is not reasonable to believe her knowledge of the former client will not impact her representation. Finally, Nancy has violated the RPC by using her knowledge to disadvantage the former client. She knew, by virtue of working at the law firm that there were mold problems with the apartment. She used that knowledge to include an indemnification clause in the agreement, using the information against the seller, who may or may not have known about the mold issues. The inclusion of the indemnification agreement in the contract is also what likely led to the contract falling through, causing harm to Nancy's own client.

Nancy has violated the RPC by taking Corey on as a client.

### *Fees*

Fees must be reasonable. Factors of reasonableness include the skill required, the time required, the reputation and skill of the attorney, and the typical fees charged for similar work in the field, amongst other things. A retainer fee is permissible so long as the attorney explains what the fee will be used for (either as an account the attorney will draw her fees from or as a holding fee to reserve the attorney's services).

Here, Nancy requested a \$20,000 retainer from Corey. The facts indicate that this was more than the customary rate, but that Corey nonetheless gave her a check for the retainer. This fee is unreasonable because it is higher than normal and Nancy has no experience in the field of real estate law. The fee is also unreasonable because half of it (\$10,000) was non-refundable and to be used for the work completed in a short time frame. But Nancy only added one provision to the agreement that Sandra drafted and only agreed to give Sandra 25% of the fee for her work (splitting fees with nonlawyers discussed below). \$10,000 is unreasonable for such a small amount of work. Although Nancy properly explained to Corey how half of the retainer would be used (half non-refundable for the immediate work), she did not explain how she would use the other half.

Nancy's fee is unreasonable and she has violated the RPC by charging such a high rate and not informing her client thoroughly of how it would be used.

### *Managing client funds/disputed funds*

A lawyer has a fiduciary duty towards her clients. A lawyer must keep client trust accounts and the firm operating accounts separate at all times. A lawyer can place her own funds into the client trust account *only* for the purpose of paying bank fees. A lawyer violates the RPC when she commingles funds. If funds are in dispute, the attorney may take out the undisputed amount to pay her fee, but must keep the disputed amount in the client trust fund.

Here, Nancy placed half of the retainer, \$10,000 in the operating account and half in the client trust fund. This was proper because Nancy had "earned" the \$10,000 immediately pursuant to her agreement with Corey. When Corey demanded his retainer back, it is unclear whether he meant the entire retainer or the portion that was not non-refundable. Because there was no closing, Corey likely meant the entire retainer. Nancy should have taken the entire \$20,000 and kept it in the client trust account until she solved the dispute with Corey. Here, the facts state that she refunded the unused part of the retainer. Had Corey demanded the entire amount, refunding the \$10,000

was permissible because those funds were not in dispute between the parties. However, unless Nancy moved the other \$10,000 into the client trust account, she has violated the RPC.

Nancy has violated the RPC by not holding disputed client funds in the client trust account.

### ***Splitting fees with non-lawyers***

A lawyer may not split fees with non-lawyers. A lawyer may refer a client to a nonlawyer or may work with a nonlawyer to perform non-legal work, however they must never split fees. Additionally, a lawyer must ask a client before working with another party and receive the client's informed consent.

Here, Nancy has breached the RPC by splitting fees with Sandra, a non-lawyer. This is particularly true because it appears that Nancy has taken advantage of Sandra by giving her only 25% of the \$10,000 nonrefundable fee for Sandra doing all of the work. Sandra reviewed the agreement in a day and made all of the necessary changes. Nancy only added one provision. Moreover Nancy also did not get consent from Corey to work with Sandra or to split fees with her.

Nancy violated the RPC by splitting fees with a nonlawyer.

### ***Duty to communicate***

A lawyer has a duty to communicate with her client about important changes in the case and to keep her client informed. A lawyer must respond promptly to requests for information.

Here, two weeks passed without Nancy communicating anything with Corey. Corey had to call and ask Nancy what happened, to which Nancy responded that she did not know. Although Nancy promptly responded to Corey's request for information, Nancy had not been diligently pursuing the case to give him a response.

Nancy violated her duty of communication.

### ***Duty of diligence***

A lawyer has a duty to diligently represent her client and to pursue her client's objectives.

Here, Nancy did not pursue her client's objectives because the extent of her communication with the seller was her email of the revised agreement directly to the seller. Nancy made no efforts to follow up with the seller or to find anything out about the closing.

Nancy violated her duty of diligence.

### ***Communication with represented parties***

A lawyer may not communicate directly with parties that the lawyer knows are represented by counsel. The lawyer must contact the party's counsel rather than speaking with the party directly.

Here, Nancy sent the seller the revised purchase agreement directly, rather than sending the agreement to the seller's lawyer. Nancy had no reason to believe that the seller was not represented because she noticed that the purchase agreement had been drafted by a different law firm and likely saw that firm's letterhead on the agreement.

Nancy violated the RPC by sending the agreement directly to the seller.

***Unauthorized practice of law***

An attorney may not encourage or fail to stop the unauthorized practice of law by a nonlawyer.

Here, Nancy handed the purchase agreement to Sandra--a nonlawyer--and asked her to review it and make any necessary changes.

Although Sandra is likely well versed in purchase agreements as she is a real estate broker, Corey contacted Nancy--a lawyer--to review the agreement and ensure that it complied with the applicable laws. Corey contacted Nancy to get legal advice.

By asking Sandra to review the document and make any changes, Nancy has encouraged Sandra to engage in the unauthorized practice of law.

***Responsibility for non-lawyer and subordinates***

A lawyer is responsible for the violations of nonlawyer staff and subordinates if she knows about the conduct and ratifies it, encourages it, or fails to fix it.

Here, Nancy will be liable for Sandra's unauthorized practice of law because she encouraged the behavior and ratified it.

Nancy has violated the RPC by encouraging Sandra's unauthorized practice of law.

**\*\*\*\*\* Question 1 ENDS HERE \*\*\*\*\***



**JULY 2019  
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**QUESTION 2**

### Exam Information

Exam Date:

7/2019

Exam Name:

Question 2

\*\*\*\*\* Question 2 STARTS HERE \*\*\*\*\*

## Question 2

1. The laws of Nevada will likely govern this case.

The issue is whether in this case which was filed in Nevada State Court will choose Nevada laws or California laws in this conflict of law decision.

Under conflict of laws principles, typically a state will use its own procedural laws and choose substantive laws based on its choice of laws rules. Nevada typically uses Second Restatement, most substantial relationship approach in analyzing choice of law issues. Here this is a torts claim in Nevada State Court.

There are three main approaches in choice of law analysis.

The vested interests approach of the First Restatement will typically choose the location of the injury as its choice of law. This does not always provide reasonable results, and there was a need to revisit this approach after there was a case where 2 New York residents were involved in a car accident in Canada and it did not seem just to apply Canada law.

The second restatement - most substantial relationship approach, takes a variety of factors into account including citizenship of parties, location of injury, interests of the forum state as well as the state of injury or occurrence, ease of application of laws, and general principles of fairness to parties.

The government interest approach weighs the policy interests of the states involved either by citizenship or place of injury. If there is no conflict, (false conflict) the state laws which has the interest applies. If there is true conflict, the interests are weighed but often will go with the forum state.

In some cases the substantive laws are split between state laws, referred to as depechage.

Here, in this case, the case was filed in Nevada State Court, therefore Nevada will decide which substantive State laws to apply based on the most substantial relationship approach of the second restatement.

In this case Ivan, the plaintiff, is a Nevada resident, this will weigh heavily in the analysis as this provides a very substantial relationship to Nevada, and Nevada is interested in protecting and governing its citizens with its own choice of law. Additionally, Carlos the coplaintiff to Ivan's estate, is also a Nevada resident and Carlos' injuries are related to Nevada as far as his job and university. The fact that Ivan was drinking would also factor into Nevada relationship as he is a Nevada resident potentially driving under the influence of alcohol.

The defendants are California citizens, Dave is a California citizen and his truck was owned by a California corporation with potential vicarious liability. The e-cigarette was purchased in California, but the company does business in both Nevada and California. The fact that Ivan was driving possibly under the influence of alcohol in California would be an important relationship to California. Therefore California has relationships to this case as well.

The plaintiff was hospitalized in Nevada, and the death occurred in Nevada. The medical bills are Nevada bills paid for with Nevada health insurance.

Finally in the analysis, the fact that Nevada has more favorable laws is important in deciding which state has the most substantial relationship. There is a reason that Nevada wants to protect its citizens in such tort cases with favorable laws. These laws will be clearly applied with the purpose of the laws applied to the citizens that the laws were designed to protect. While this last element is also consistent with the government interest approach, it is part of the analysis of the most substantial relationship approach.

In analyzing the most substantial relationship, the facts are analyzed in view of the claims. This is a case in torts, with a strict product liability claim and a negligence claim. While both states have substantial relationships to this case, Nevada has the most substantial relationship to this case and will apply. The plaintiff is a Nevada citizen injured by a product which is also in distribution in Nevada. Ivan died in Nevada, and Carlos also a Nevada resident has his life affected in Nevada.

Therefore, Nevada has the most substantial relationship and the Nevada Court will apply substantive Nevada law to this case.

2A. The plaintiffs have a viable claim for strict products liability against the e-cigarette manufacturer, and will not have many defenses available.

The issue is whether the plaintiff has met the criteria for a prima facie case for strict products liability against the e-cigarette company under Nevada law.

Under Nevada law, for a prima facie case for strict products liability, a plaintiff needs to show that the defendant set out into the chain of commerce a dangerously defective product, that the defendant knew or reasonably should have known of this risk and that the plaintiff was injured because of this danger. The plaintiff injured does not need to be in any privity with the defendant. The defendant owes a duty to anyone harmed by a dangerously defective product. It doesn't matter how careful the defendant was, in strict liability duty and breach of duty are not factors.

A product is dangerously defective from one of three theories. (1) Design defect is when there is an alternative safer reasonable and financially practicable design available. This is judged either by the consumer expectation analysis where a reasonable consumer would expect a safer design or the risk-benefit analysis where the risk of the product outweighs the benefit. (2) Manufacturing defect where the product as manufactured differs from its original design causing the risk. and (3) failure to warn where, the risk is not obvious, the manufacturer knew or should have known of the risk, and there was no warning.

In Nevada, unlike some other states, it is not presumed that the plaintiff would have heeded the warning if it was there. So a plaintiff needs to prove that he or she would have heeded the warning, which makes the case slightly harder for the plaintiff on that point.

Here, in this case, the e-cigarette exploded in Dave's pants pocket. While we do not know why it exploded, e-cigarettes should not explode in someone's pocket. Therefore the e-cigarette was a dangerously defective product that was put out in commercial circulation. The company produced a product that they should have known has the risk of exploding and Ivan was injured because of the dangerously defective e-cigarette.

causation is clear in this case, there is actual causation, if it were not for the explosion of the e-cigarette, Dave would not have hit Ivan, and there is proximate causation, it is foreseeable that if an e-cigarette explodes in someone's pocket while driving, there could be a car accident.

While the exact cause of the dangerously defective e cigarette is not known at the time of filing the case, negligence is not an issue in strict product liability. For the negligence case, Ivan's estate and Carlos can rely on the principle of Res ipsa loquitur to survive any attempt at motion for summary judgment on the part of the defendant. The e-cigarette was in sole control of the defendant when put out into the stream of commerce, this is the type of injury that only occurs with defendant's fault. Nevada does not apply defendant's fault to res ipsa with strict products liability.

#### Defenses

There are not viable defenses or offsets here for the strict liability claim.

Under Nevada law, the defenses to strict liability are assumption of risk and consent, and possibly contributory negligence. However, Nevada modified comparative negligence statute does not specify strict product liability and therefore likely does not apply.

Here Ivan was negligent in driving after drinking several beers. This is not a defense to strict product liability. It is unclear that this negligence had anything to contribute to the injury and Nevada does not apply its modified comparative negligence model to strict liability.

Assumption of risk does not apply to Ivan or Carlos and would be a weak defense against Dave because he likely was not aware of the risk of e-cigarette explosion.

If there was a warning that was clear and not heeded that could be a defense to failure to warn. If there was a warning that putting the e-cigarette in your pocket on a hot day could cause an explosion may be a defense, but the facts do not say that and that is still unreasonably dangerous, although then assumption of risk might be raised.

If the e-cigarette was altered in a way that was unforeseeable and the company did not realize the product in a dangerously defective way, that would be a defense but the facts don't show that.

In Nevada, insurance payments of hospital bills do not offset damages, but the insurance company may be indemnified by the plaintiff.

2B. The damages that are recoverable would be personal injury damages, economic damages, and punitive damages. Defendants have defenses that Carlos did not meet the prima facie case and offsets that the insurance paid for the hospital bills and the earnings from the lucrative business deal are speculative.

Under Nevada law, damages in a tort claim include personal injury damages, economic damages, pain and suffering, loss of consortium, punitive damages and all damages that result from the injury. Special damages are calculable like lost wages, and general damages are not calculable like pain and suffering.

In strict product liability economic damages alone are not recoverable, but here there is also personal injury, pain and suffering, etc.

Dave and the trucking company have a defense against Carlos that he does not meet the prima facie case for negligent infliction of emotional distress (NIED). For NIED, the plaintiff needs to be in the zone of injury. Here that was not the case. For relational NIED, the plaintiff needs to be a close relation which Carlos is, but also needs to have witnessed the injury which Carlos did not.

To prove negligence there must be duty, breach of duty, causation, actual and proximate and damages. There is a prima facie case of negligence against Dave and against the trucking company, potentially respondent superior, or vicarious liability through the employer-employee relationship. If Dave was an independent contractor, liability to the trucking company may turn on the degree of control that the trucking company had over him. The fact that it was their truck will weigh to vicarious liability. Driving a truck may also be a non-delegable duty where the trucking company has liability even with an independent contractor.

In this case while there is a claim for negligence and the damages that flow from it, there is not a good case for NIED. Carlos was not in the zone of injury and he didn't see his father get injured. Carlos seeing his father in the hospital does not qualify for NIED. He may try a loss of consortium claim, but that is primarily reserved for the spousal relationship.

There is a comparative negligence defense for the negligence claim because Dave did drink several beers before driving. In order for this to be a viable defense, Dave and the trucking company would need to show that this negligence contributed to the injury. In Nevada, under the modified comparative negligence defense, if the plaintiff is more than 50% negligent there is no recovery in a negligence claim. If the plaintiff is less than 50% negligent, the plaintiff can still recover but the award may be reduced in the amount of his negligence.

The wrongful death action, especially against the cigarette, may result in punitive damages. The hospital bills are all specific damages that are recoverable, the full \$200,000, not just the \$25,000 that the insurance did not pay. The pain and suffering would be potentially awarded, because Ivan was hospitalized 3 days, sometimes conscious, he was likely in pain and suffering those 3 days.

The expectancy damages of the lucrative business are less likely to be recoverable. Recovery on that lucrative business deal may depend on how much if any was invested and how sure returns on that deal was, whether the deal was lost due to Ivan's death or if it possibly remained for Carlos to continue that deal remains. However, a defense to the expectancy damages on the lucrative business deal is that any profits were speculative.

Similar to the discussion above, the payments of medical bills by the medical insurer would not be offset.

If Nevada has more favorable laws and precedent to recovery of damages, many of the issues that are questionable, like the certainty of profits in the lucrative business deal may weigh in Ivan and Carlos' favor.

\*\*\*\* **Question 2 ENDS HERE** \*\*\*\*



**JULY 2019  
EXAMINATION ANSWERS**

**APPLICANT'S ANSWERS TO QUESTIONS  
NEVADA BOARD OF BAR EXAMINERS**

**QUESTION 3**

### Exam Information

Exam Date:

7/2019

Exam Name:

Question 3

\*\*\*\*\* Question 3 STARTS HERE \*\*\*\*\*

### 1. Is there a contract? What are the terms?

Applicable Law - The applicable law for the sale of goods is the Uniform Commercial Code (UCC).

Here, the contract is for the sale of art products, and those are goods, therefore the UCC applies.

Merchants - Merchants are those parties that operate in the sale or purchase of the goods considered in the contract.

Here, Barbara is an art trader and Samuel has an art gallery. They sell and purchase art as part of their livelihood. They are merchants.

Bi-lateral/Unilateral Contracts - A bi-lateral contract may be accepted by promise or performance. A unilateral contract may only be accepted by performance. Yet, part performance makes a unilateral contract non-revocable until the performing party is provided a reasonable amount of time to complete performance of the contract.

Offer - An offer is a present manifestation with specific terms to enter into an agreement. The offer is considered from the reasonable perspective of the offeree. The offeror is the master of the offer and may revoke, unless it's a valid option contract, at any time. The revocation removes the offeree's right to accept the offer.

Here, there was no revocation. The offer and acceptance are analyzed below.

Acceptance- Acceptance is a present manifestation to agree to the offer and enter into an agreement with the offeror. The acceptance requires sufficiently unequivocal terms.

Here, the analysis for offer and acceptance is below. The final email from Barbara is likely an acceptance of a counter-offer. Yet, Samuel's delivery may be considered the acceptance of Barbara's counter-offer final email, albeit a non-conforming acceptance and therefore a counter-offer under the UCC. Further analysis is below as well.

Consideration- Consideration is the bargained for exchange in a contract. The bargained for exchange should be a legal detriment. The legal detriment occurs when a person agrees to do or agrees something did not have to do before or to refrain from doing something for which they had a legal right to do.

Here, the consideration is good. Barbara offered to pay and Samuel agreed to sell his goods.

Statute of Frauds (SoF) - Under the SoF, a UCC contract must be in writing if it is \$500 or more and must contain the material term. The only material term is quantity. All other terms may be inferred with gap-fillers.

Here, there are several communications that need to be analyzed. The first email on July 2, constitutes an offer from Barbara. She had sufficient terms and a reasonable person in Samuel's perspective would be able to accept and create a contract.

Yet, Samuel responded with different terms and was not an acceptance on the same day. Samuel did not have the present manifestation to accept the terms. In fact, Samuel's email constituted a counter-offer because he provided different terms and did not provide an unequivocal acceptance of Barbara's email.

Barbara's immediate response was the final written out communication. This final email constitutes a final expression of acceptance from Barbara of Samuel's counter-offer. She said she did not have a choice and needed the art. She insisted on delivery terms and agreed to the price and she also expected the items originally mentioned in her first email. This constitutes an acceptance because it is sufficiently unequivocal, despite her language about not having another choice.

Even if Barbara's response was not an acceptance, Samuel sent the delivery. The sending of the items that were considered in the contract can be considered acceptance if they are conforming. If they are non-conforming, then delivery is considered a counter-offer. Here, the delivery was non-conforming and that would constitute a counter-offer. In that event Barbara has several options such as accept, reject, or accept the conforming part and the non-conforming part. Yet, nonetheless there was offer and acceptance and consideration.

The SoF is met because of the emails. The emails contained the material term of the items/quantity sold, and were in writing. Emails consummate the writing necessary under the SoF, despite an official signature, because the party being held accountable can be determined to have sent the email.

UCC 2-207 - Battle of the Forms - Under the UCC, the acceptance between merchants of a contract constitutes the terms of the contract. Except, where the acceptance provides additional terms, the additional terms are a part of the contract unless they are considered a material alteration of the contract or are directly argued to by the other party. The adding of a settlement arbitration is considered material. If the acceptance has different/ contradictory terms, then the different/contradictory terms will cancel out and the court will use a gap-filler.

Here, the terms are different. Barbara's acceptance of Samuel's counter-offer had additional and different terms. First, the additional terms were the arbitration clause and the time is of the essence clause. The time is of the essence clause is important, because that is not normally assumed in contracts and changes the need for time and cure remedies for a breaching party. Yet, it is not material and will be added to the contract. The arbitration clause is likely material because it sets a location and mandatory arbitration in the event of breach. This will be stricken from the final contract. The different terms are the place of delivery and the type of contract. The FOB my gallery from Samuel means a seller's shipment contract. The FOB my gallery from Barbara is a buyer's shipment contract. This means the liability changes. These terms are cancelled out and the gap filler used.

The gap filler used for place of delivery, if the contract does not specify, is the seller's place of delivery. Yet, in this case, Samuel did ship the goods according to the terms sent by Barbara and therefore he likely accepted that term. FOB Samuel's gallery, as he wanted, means Samuel need only provide the goods to a common carrier and notify Barbara of their being at the common carrier. At that point, the risk of loss shifts to Barbara. Yet, the FOB Barbara's gallery in Reno means that Samuel must get the goods to Barbara and tender delivery to her and make them available before the risk of loss shifts to Barbara. Because Samuel sent the goods to Barbara's gallery in Reno, that can be considered an implied acceptance of the terms of her contract.

Terms- The following terms result from the contract:

Price: \$11,000 - Date: July 25 - Place of delivery: FOB Barbara's gallery in Reno - Items: Calypso painting, sleeping cat sculpture, Ansel Adams Yosemite photograph - Time is of the Essence Clause: No later than July 25 because of the showing on July 26

**Defenses**

Mistake - A mutual mistake of a term in the contract may undermine the validity of the contract. A mutual mistake means that both parties were mistaken as to the terms of the contract, and neither party had knowledge of the mistake, and neither party knew of the other party's mistake.

Here, Samuel will likely argue mistake. He will say that he wrote Ansel Adams in the terms of his counter-offer. Barbara will argue that his mistake is not reasonable because she made her original offer sufficiently clear by specifying the Yosemite painting from Ansel Adams. Additionally Barbara will argue that the painting was the only Ansel Adams painting on the floor and that she specified that the discussion they had on the gallery floor that day. She will say that it is not reasonable to mistake the Ansel Adams paintings into the gallery's back room with the Ansel Adams painting on the gallery floor. Barbara is likely to win on this matter.

No Acceptance - see above analysis regarding Samuel's delivery constituting a counter-offer and Barbara's rights under that counter-offer.

**2. Who is responsible for the damage to the cat sculpture? Explain**

Shipment Contracts- The risk of loss depends on how the court reads the FOB terms and Samuel's delivery. FOB Reno means that Samuel must get the goods to Reno in order to shift the burden as discussed above in the terms.

It is likely that Samuel is responsible for the damage to the cat sculpture. Samuel impliedly accepted the different term of Barbara's email by shipping the goods to her gallery in Reno. Had he rejected that term and wanted to accept through performance, then Samuel could have provided the goods to a common carrier in his gallery and then notified Barbara that the goods were available for her to pick up. Yet, Samuel decided to ship the goods to Barbara's gallery. Therefore, it is likely he accepted.

The two terms, if Samuel didn't accept, will cancel out according to UCC 2-207. The gap filler for a place of delivery is the Seller's location. Therefore, once Samuel set the items aside, and made the goods available to Barbara, then Barbara would have accepted risk of loss. Yet, this only supports Barbara's claims. Samuel didn't even notify Barbara that he was sending the goods or making them available. Therefore, Samuel is likely responsible for the damage to the cat sculpture.

**3. Barbara entitled to return all the items? Explain**

Perfect Tender Rule - The UCC requires a perfect tender. The delivery of the goods must be perfectly conforming to the contract. If they are not a perfect tender, then the non-breaching party may accept, reject, or accept the conforming part and reject the non-conforming part. A non-breaching party may not reject after accepting if they had a reasonable opportunity to inspect the goods for conformity. The non-breaching party may accept if they act with dominion over the goods.

Here, Samuel did not perfectly tender. Therefore, Barbara is entitled to reject the goods in total. She did not act with dominion over the goods. She did not accept the goods. She even had to cancel her show because the goods were non-conforming. It is Barbara's right to completely reject the goods on either the grounds that she accepted his counter-offer email or under the grounds that his delivery was a counter-offer of her return email with the added terms. Either way Barbara may return all items.

**4. Barbara commence arbitration proceedings in Reno, NV? Explain**

UCC 2-207- See the law above.

As discussed above, the arbitration term is a material addition to the contract. Therefore, her acceptance of the contract does not include this addition. It is material because it substantially alters the rights and liabilities of the people in the contract. Here, having the right to call for arbitration in your home town may place Samuel at a disadvantage, especially if he didn't know it was in the contract. Yet, the term is knocked out of the contract. Barbara may not commence arbitration proceedings in Reno.

**5. Barbara entitled to recover \$20,000 out of pocket costs and lost profits for cancellation of show. Explain**

Remedies/ Damages- A non-breaching buyer may obtain expectation damages, consequential damages, and incidental damages. Contract law does not impose punitive damages.

Expectation Damages- Expectation damages place the non-breaching party in the same position as if the contract had been performed. Under the UCC this is the cost of the original contract minus the fair market value at the time of the breach or the original contract minus cover.

Here, the contract is not likely to be enforced so there are no damages. Barbara did not pay. Because of Samuel's breach she is discharged from her duties.

Reliance Damages- Reliance damages may be obtained if the breaching party represented they would conform with the contract, and the non-breaching party relied on that representation by changing their circumstances. They may rely by spending money on the representation that was made. The reliance must be reasonable.

Here, Barbara is likely to receive the \$20,000. She relied on Samuel's representations in their emails. She paid for her gallery and showing because of the emails they had. Yet, Samuel will argue that he did not represent anything before she relied because he did not actually send an email accepting the counter-offer she made. Yet, Barbara will argue in return that Samuel's email was a counter-offer and she accepted with her final response and that she reasonably relied. It is likely the court will find that Barbara reasonably relied on the words of a merchant in a contract and relied on his representations that he would deliver the goods at the agreed upon price and in the time frame.

Lost Profits for Volume seller- A non-breaching party may obtain their lost profits if they can show they have an infinite source of the products, they can show that they would have sold the goods but for the breaching party's breach of the contract. The non-breaching party cannot argue speculative profits.

Here, Barbara is not likely to receive the lost profits from the cancellation of the show. She will not be able to show that she had an infinite source of goods from which she could have sold. The art is specific and unique. Additionally, the profits are speculative. Barbara cannot show with any specificity, based on the facts stated, that she was actually guaranteed a sell at her gallery. Therefore, absent other facts she is not likely to obtain lost profits because those damages are too speculative.

\*\*\*\*\* Question 3 ENDS HERE \*\*\*\*\*



**JULY 2019  
EXAMINATION ANSWERS**

**APPLICANT'S ANSWERS TO QUESTIONS  
NEVADA BOARD OF BAR EXAMINERS**

**QUESTION (**

\*\*\*\*\* Question 4 STARTS HERE \*\*\*\*\*

### DARLENE'S RIGHTS TO EASEMENT OVER PARCEL A1

an easement is an interest in the use of land. an easement may be created expressly or implicitly. An easement, as it is an interest in land, must be in SOF, *unless* it is an implied easement and it has already been performed.

one easement created implicitly is one of necessity. under necessity, the land must have been under common ownership at some point, and wehn the land was severed into two parcels, one parcel was *landlocked*. an easement by necessity is created because it is necessary that the parcel that is landlocked have access to a public road.

here, D has a esement created by necessity. prior to D, C had the easement when A conveyed parcel A-2 to her. it is irrelevant whether A was aware or approved of the easement, or whether it was expressly created because when A conveyed parcel A-2 to C, C's parcel was landlocked and C did not have any access to the public road. Main street was only accessible through the remainder of A's land, as such, C appropriately retianed an easement over A-1's parcel.

an easement that is created implicitly and thus silent on the terms, is presumed to be for a reasonable use and it is presumed to be perpetual. an easement by necessity, however, terminates as soon as there is no longer a necessity.

thus, D's easement of necessity is deemed to be perpetual, and any reasonable use related to accessing the public road. here, the necessity is still present, as D still does not have access to a public road. D's parcel remains landlocked, thus the necessity still exists. as such, the easement by necessity has not terminated.

### TRANSFER OF EASEMENT

there are two kinds of easements: easement appurtenant and easement in gross. an easement appurtenant involves two parcels of land, that is the dominant parcel, the parcel benefiting from the easement and the servient parcel, that is the parcel that is burdened by the easement.

here, the dominant parcel is C/D's because this is the parcel that is benefiting from the easement, by having accessibility to a public road. as such, the servient parcel is A's because she is burdened by C/D's use of the easement, as they have to walk/drive across her parcel to get to the public road.

## TRANSFER

An easement appurtenant transfers automatically with the dominant estate, regardless if it is stated in the deed of conveyance. the easement appurtenant may not be transferred separately from the dominant estate. further, it is also transferred automatically with the servient estate unless the successor did not have notice, either record, actual or inquiry notice (the successor is charged with whatever a reasonable inspection of the land would reveal).

here, the facts are not clear as to the conveyance of the deed between A and C and later C and D, but that is immaterial here, because as an easement appurtenant by necessity was created, the easement transferred *automatically* between C and D. the fact that C did not tell D about the easement, does not terminate the easement or fail to transfer the easement- it is irrelevant because the easement transferred automatically. in such a case, issues are only presented with the conveyance of the servient estate, when the successor in interest does not have notice, but that is not at issue here.

THEREFORE, the conveyance from D to C successfully transferred the easement.

## DEFENSES

A may argue that the easement is terminated because there is no longer a necessity as she is using parcel B. however, this argument will fail because D's arguments to use parcel B to access the main road are weak, at best. A's parcel is the best way for D to access the public road, as such A's argument that it has terminated the easement will fail.

## license

A may also argue that she has not created an easement to C but rather a license to C and thus D does not have a license to use her property. a license is a privilege to use land for a specified use. it is not a property interest, and thus it is revocable at any time.

A will argue that she created a license between her and C and thus the license, as it is personal, does not transfer to D. thus the license terminated when C conveyed the property to D. however, this argument fails because C and D needed

to use A's parcel to get access to the public road, a strict necessity. the court will likely find that A had created a license because if A were allowed to revoke it, C/D would be landlocked, thus preventing them from the enjoyment of their property.

even if the license agreement were entertained, it would fail because it is likely that C and D may support the argument that they reasonably relied on the "license continuing" thus making the license irrevocable. an easement by estoppel is any any license may become a easement by estoppel if the party in reasonable reliance on the license invested substantial money and labor on the license continuing. further fact development would be required to support this argument, to show that C or D or both have invested substantial money or labor in reliance, such as making repairs, etc.

A has no other defenses to the easement as the parties have not made any representations that they are abandoning the easement, and A has not relied on such statements; the land has not been destroyed, the land has not been condemned, there is no written release by C or D releasing A of the easement, and C and D have continued to use the easement. as such there is no evidence to support a finding that the easement has terminated because the necessity still exists.

therefore, any of A's defenses fail.

### **DARLENE'S RIGHTS AS TO EASEMENT OVER B**

#### EXPRESS EASEMENT

D does not have an express easement because B has expressly, either words or writing, created an easement. thus, she has no express easement.

#### EASEMENT BY NECESSITY

Darlene has no interest in the use of land over parcel B. D may argue that as she has an interest in parcel A1 by necessity because she is landlocked, she similarly has an interest in B. however, this argument fails because although her parcel remains landlocked, D has access to the public road through A1 and D would be unable to prove an easement by necessity because her parcel- parcel A2 and B were never under common ownership. thus she fails to satisfy one of the elements.

## EASEMENT BY PRIOR USE

D may succeed in claiming that she has an easement by prior use. An easement by prior use may arise if the (1) parcels were once under common ownership; (2) the owner had a similar use of the parcels at the time; (3) the party claiming the easement has made such a similar use of the parcel at this time, and (3) the easement is necessary for the enjoyment of the dominant parcel.

here, again, D's claim fails because D does not meet the first element of the prior use. Parcel A1 and B have never been under common ownership and thus D may not obtain an easement by prior use.

## EASEMENT BY PRESCRIPTION

an easement by prescription is created when the use of the land is (1) hostile, against the owners consent; (2) Lasting, that is that the use be for the statutory period, which is 5 years in NV, (3) Uninterrupted for the statutory period (4) visible and (5) actual. there is no requirement that the use be exclusive.

Here, D's best argument is that she has an easement over B's parcel by prescription because there is no requirement that her parcel and B's be under common ownership at some point.

**hostile:** Here, D and C have both been using B's property to access the main road without his permission, thus hostile use of the land.

**Lasting:** D has been using B's land as an access road since the land was conveyed to her in 2014. if we are in 2019 she has been using the land for 5 years and thus satisfies the statutory period. if however, we are in 2018 for example, D may tack on the period of C's use since she was the prior owner and similarly used the land to satisfy the statutory 5 year period. as such, both parties have been using the land for 6 years (assuming we are in 2019). as such the statutory 5 year period is satisfied.

B may argue that the 5 year period has not been met by D, as argued below, because the time period has been interrupted and she may not tack on C's prior use. D on her own has not used the land for entirely 5 years assuing that she has also only used it occassionally.

**Uninterrupted:** to satisfy the statutory period, the party making a claim may tack ont he years of prior successors in interest. as such, D may tack on the periods that C used the land. as such, since C started using the ladn in 2013, and

assuming it is 2019, the parties together, satisfy the statutory 5 year period. because C and D are combining their periods in the use of the land, the period has been uninterrupted as there are no gaps.

B may argue that the period has not been uninterrupted because C only used the land *ocassionally*. the key question here, is whether such use was reasonable considering the nature of the land, and if a true owner would make such occasional use. B may succeed in this argument if he may find further facts to support that the use was rare, unlike that of a true owner, thus creating gaps. this may be inferred because C had access to A's land to access the main street and thus there were days when B's land was untouched. as such, B may likely succeed in arguing that the uninterrupted element is not met.

**Visible:** Visible requires that the use be open and notorious. here the facts support a finding that C and D use has been open and notorious because both A and B were aware and even sent C demand letters. further, B demanded 25k from D, thus showing that her use of the land was visible.

**Actual:** this element requires actual possession. here, this is supported because C and D actually crossed B's land to access the road, thus they were physically on the land when they were using it. thus the actual element is satisfied.

## TRANSFER

any easement that C had transfers automatically with the dominant estate when C conveyed the land to D.

THEREFORE, D may succeed in arguing that she has an easement by prescription on B's land, but her argument will be weakened if B successfully argues that the "uninterrupted" element was not met.

## ADVICE TO DARLENE

I would advise darlene to pursue the easement from A because she is more likely to succeed on that claim because that easement arose from a strict necessity and the policy behind the law supports finding in her favor.

further, she is unlikely to succeed against B because B may successfully argue that the elements for prescriptive easement are not met, as C only occasionally used the land, and it is likely that D also did not use it as frequently as a normal owner would because C and D both had access to the A1 parcel to access main street. again, the issue here is what is normal use of the land? Still, B's arguments would require further support, and B's argument would only succeed if we are assuming that the occasional use is not normal use of the land.

if D has facts to support a finding that she did use B's land for 5 years uninterrupted, or such occasional use is normal use of such land, i would advise her to come back to my office so that i may reanalyze the facts. Having an easement on B's land may be beneficial, because once the necessity terminates (once she is no longer landlocked) the easement D has over A's land will automatically expire. if however, D were to succeed in a claim against B, she may retain an easement in B and still have access to main street through parcel B.

I would also advise D that she may get a license to use B's land. this is personal to her and thus may not be transferred once she conveys her land. B may be willing to allow her to use the land for the specific use because now D is asking rather than simply using without his consent. D will not, however, be able to rely on the continuation of the license because B may revoke it at any time.

THEREFORE, it is in D's best interest to seek the easement against A for necessity.

\*\*\*\*\* Question 4 ENDS HERE \*\*\*\*\*



**JULY 2019  
EXAMINATION ANSWERS**

**APPLICANT'S ANSWERS TO QUESTIONS  
NEVADA BOARD OF BAR EXAMINERS**

**QUESTION )**

### Exam Information

Exam Date:

7/2019

Exam Name:

Question 5

\*\*\*\*\* **Question 5 STARTS HERE** \*\*\*\*\*

This case was originally filed in Nevada state court, but most of the issues below involve the Federal District Court for the District of Nevada. Therefore, the Federal Rules of Civil Procedure apply (FRCP).

I. The defendant properly removed the action to Federal District Court.

*Rules -*

A defendant sued in state court may remove a case to the Federal District Court which encompasses the state court that the suit was originally filed in. Only a defendant may remove. A defendant may remove if the action could have originally been filed in Federal District Court. To file a case in Federal District Court, the federal court must have subject matter jurisdiction over the action.

Subject matter jurisdiction is obtained in two ways. First, diversity jurisdiction. Diversity jurisdiction arises when there is complete diversity of citizenship between all plaintiffs and all defendants. Corporations are citizens of both the state in which they are incorporated as well as the state in which they have their principal place of business. An action heard in diversity must have a complaint valued at more than 75,000 dollars. Second, a federal court will have original jurisdiction over a matter if it entails a federal question, this is known as federal question jurisdiction. For federal question jurisdiction to exist, the complaint itself must allege a cause of action under a treaty, federal law, or the Constitution of the United States.

Once the court has subject matter jurisdiction, other claims arising from the same transaction or occurrence may also be heard by the federal court. This is known as supplemental jurisdiction. In other words, the federal court may hear claims that would not otherwise be available to be heard in federal court so long as they arise from the same transaction or occurrence.

To remove, a defendant should file a notice of removal in the federal district court, notify opposing parties about said removal, and subsequently notify the state court of its intent to remove. A case may be removed as a matter of right by the Defendant if the requisite elements are met, and it does not need permission of the state court.

*Application -*

A. Diversity (Not available)

Here, NVEvents (Plaintiff) is a citizen of both Delaware and a citizen of Texas. Kicks (Defendant) is a citizen of Nevada. Therefore, this is complete diversity. The cause of action alleges 1 million dollars in damages, so the amount in controversy is satisfied as well. Plaintiff has brought suit against Defendant on three causes of action. First, it alleges a violation of the federal law Defendant Trade Secrets Act; it has also brought actions under three state law causes of action. On this basis, there would be diversity jurisdiction EXCEPT for the fact that the FRCP states that when a federal court hears a case in diversity, the defendant, if sued in its home state court, cannot remove the action to the federal court.

Here, the case was brought in Nevada state court. Kicks is a Nevada citizen. Therefore, Kicks may not remove to federal district court as Defendant is a citizen and has "home state advantage." Thus, diversity of citizenship is unavailable here.

B. Federal Question (Available)

However, removal was nevertheless proper because there is federal question jurisdiction. The case was brought under a federal law, the previously mentioned Defend Trade Secrets Act. Thus, diversity of citizenship is not required and the court may hear the federal claim.

#### C. Supplemental Jurisdiction (Available)

The remaining three state law claims may be heard via supplemental jurisdiction. All three claims arise from the same transaction or occurrence as the action underlying the federal question. The issue here is that Plaintiff and Defendant entered into a valid NDA and Defendant violated that agreement. The Defendant notified Plaintiff of its breach and its intention to move forward with a soccer match elsewhere in the country, namely Arizona. Plaintiff discovered that Defendant was using promotional materials that it owned or purported to own. In short, the violation underlying the claim is the breach of the NDA between the parties. The causes of action here relate to that violation.

#### D. Removal Procedure (Proper)

Here, Defendant filed a notice of removal in the Federal court encompassing the state court (The District of Nevada). Moreover, one has 30 days from receiving notice that a case is removable to remove a case to federal court. Here, the removal occurred 10 days after notice, so it was timely. This was the proper way to remove the case.

#### E. Personal Jurisdiction (Available/Satisfied)

A federal court must have personal jurisdiction. A court will have PJ over a plaintiff because the plaintiff has brought the case to the court. There are several ways to have PJ, including domicile and personal service over the defendant in the forum. At a constitutional level, to have PJ over a defendant there must be minimum contacts. Minimum contacts is defined as (1) contacts with the forum that are related to the claim, (2) a foreseeability that the suit would've been brought against them, and (3) in specific JX cases, where there is fairness. However, as mentioned, a court will have general jurisdiction over a defendant that is domiciled in the state.

Here, Kicks is the defendant and is domiciled in Nevada. The case was brought in Nevada and removed to Nevada federal court. Because Kicks is the defendant and is domiciled in the forum, the court has general personal jurisdiction via domicile and there is no personal jurisdiction issue.

With respect to the 3P, there is no personal jurisdiction issue because PJ may be waived by voluntary appearance. 3P voluntarily appeared in the case, so it has availed itself to the forum state.

#### *Conclusion -*

The case was properly removed for the reasons stated above.

#### II. The court correctly ruled on the motion to remand

#### *Rules -*

Once a case has been remanded, the federal court may issue a remand to the state court if it determines that removal was improper. Removal is improper where the court does not have subject matter jurisdiction over the case. As mentioned above, a matter may be removed to a federal court so long as the federal court could originally have heard the case. The court could have originally heard the case for the reasons mentioned above, namely, that there was original federal question jurisdiction in existence and supplemental jurisdiction over the remaining claims.

A court must maintain subject matter jurisdiction over a case at all times. If a court loses subject matter jurisdiction, it must dismiss or transfer to a court that has proper SMJ over the case. Here, the matter was removed. After removal, a third party intervened. The court must have SMJ over this case as well.

*Application -*

AZ Soccer (3P) is an Arizona citizen. There is still complete diversity, but as mentioned, diversity did not allow the court to hear the matter in the first place. Thus, federal question jurisdiction and supplemental jurisdiction must still be satisfied. Since there is federal question jurisdiction here, the question is whether supplemental jurisdiction over the additional claims exists.

3P has moved to intervene because it has entered into several contracts with Defendant as a result of Defendant's breach with Plaintiff, and that it would be harmed if the event was enjoined by the Court. As such, the action that 3P wishes to bring arises from the same transaction or occurrence as the original claim and thus the court still has supplemental jurisdiction over the matter.

*Conclusion -*

The court correctly ruled on the motion to remand because it was properly removed and the court did not lose jurisdiction over the case when 3P joined.

III. The court incorrectly ruled on the preliminary injunction

*Rule -*

Plaintiff has sought a preliminary injunction seeking to enjoin use of the information covered by the NDA; enjoin use of its logo; and prevent the Arizona event from going forward. To obtain a preliminary injunction, several requirements must be met. First, the elements of a preliminary injunction must be met. Those elements are (a) danger of irreparable injury and (b) likelihood of success on the merits. When moving for a preliminary injunction, the plaintiff is generally required to post a bond and must give notice to the opposing party. The court may not issue a preliminary injunction *ex parte*, meaning without notice to opposing party.

*Application -*

A. Danger of Irreparable Injury

The first element of a preliminary injunction is danger of irreparable injury. Irreparable injury is found where the legal remedy (i.e. money damages) is inadequate. A typical scenario where irreparable injury exists is where the item is unique or the injury so great that no amount of money will compensate for the harm thereto.

a. Plaintiff's Position

Here, the cause of action alleges that Plaintiff's logo has been usurped by Defendant. Defendant stands to gain significant amounts of money in its use of the logo, as the facts indicate that thousands of tickets have already been sold. If the event goes forward, Defendant stands to earn money off the use of the logo once the event occurs. Plaintiff may also allege that the use of its logo will result in damage to its brand that will not be taken back, as the world will now associate the logo with someone other than itself. There is some merit to this position, as once the world discovers that the logo belongs to another company, it may have significant impacts on the Plaintiff's brand.

b. Defendant's Position

On the other hand, Defendant will argue that an injunction is not called for because there is no showing of irreparable injury. Primarily, Defendant will likely argue that the harm that occurred from its breach can be remedied by money damages, namely, the money made off of the event that is to take place in Arizona. Any money that is made might be recovered by Plaintiff in the future, thus Defendant will argue that money damages are adequate. This is a fairly strong argument, but Defendant may not have a rebuttal argument for the position that use of the logo will irreparably damage Plaintiff's reputation in the world.

#### B. Likelihood of success on the merits

Plaintiff is likely to succeed on the merits, which are the breach of NDA and the use of the logo. NDAs are generally valid so long as they, like any contract, are not unconscionable. There are no facts to indicate that the contract was unconscionable. Thus, the NDA is likely valid. The trademark appears to be owned by Plaintiff, and there are no facts to indicate that Defendant has a defense for its breach. Thus, this prong of the preliminary injunction seems to weigh heavily in favor of the Plaintiff.

#### C. Bond

No facts indicate whether a bond was posted. A bond is not always required, depending on the facts and circumstances of the parties, so it is possible that the court declined this requirement.

#### D. Notice

The facts indicate that notice was properly given to Defendant. Thus, this is satisfied.

#### *Conclusion -*

Based on the foregoing, the court should have granted the preliminary injunction to Plaintiff since, although money damages can make up for the money gained by Defendant via the event which is to take place, the damage to Plaintiff's reputation via the use of its logo may be irreparable because, once the world associates it with another organization, Plaintiff will be unable to meaningfully address that problem. The court should have issued the injunction requested.

#### IV. The court should grant 3P's request to intervene

#### *Rules -*

A federal court may grant a third party the right to intervene in a case. There are two types of joinder, permissive and mandatory. Permissive joinder is allowed when the party alleges an issue stemming from the same transaction or occurrence, here meaning that there is a common question of law or fact at issue. Mandatory joinder of parties (i.e. a necessary party) is required where the party seeking to intervene runs the risk of substantial legal harm if their issue is not adjudicated by the party. A court, when deciding on mandatory joinder, must decide whether a party should and can be joined.

#### *Application -*

##### A. Should the 3P be joined?

Based on these facts, the 3P is at risk of substantial legal harm if it is not allowed to defend its position in this case. Should Plaintiff prevail here, 3P's event will be enjoined. Surely, 3P has invested significant amounts of time and money into the event, has a great expectation of profit from it, and has contracted with Defendant in furtherance of that event. As such, if the event is canceled, they will be substantially and adversely impacted. The 3P should be joined.

B. Can the 3P be joined?

Here, the issue is whether there is SMJ to join 3P. The answer is yes. Again, there is original federal question jurisdiction present here, so 3P must show that the court has supplemental jurisdiction over its claim in order for SMJ to be sustained. 3P's allegation, that its event, supported by its contract with Defendant, will be canceled if it does not represent itself, arises from the same transaction or occurrence as the original federal claim, namely, the breach by Defendant with respect to Plaintiff's NDA and use of its logo. Therefore, as the claim arises from the same transaction or occurrence, 3P should be joined as there is supplemental jurisdiction present in this case.

*Conclusion -*

The court should permit AZ Soccer to intervene for the reasons discussed above.

V. The court should decline to transfer venue.

*Rule -*

Venue is proper where (1) any defendant resides, so long as all defendants reside in the same forum or (2) anywhere a substantial part of the cause of action arose. Alternatively, if neither are met, anywhere PJ exists is also allowed as a fall back. When venue is originally proper - meaning the court in which the case was originally filed in was proper for venue - the court may elect to transfer venue for convenience reasons, but does not have to do so. When original venue is improper, the court must transfer or dismiss.

*Application -*

A. Original venue

Venue was originally proper. As mentioned, venue is proper anywhere any defendant resides if all defendants are from the same forum, or anywhere a substantial part of the breach occurred. Not all defendants reside in the same forum here, so the second prong must be satisfied for venue to be proper. Here, the case was originally heard in Nevada. Thus, venue in Nevada must be proper. The Defendant is from Nevada. One of the central factual issues at stake here - the soccer match planned for Las Vegas - underlies Defendant's breach. The logo at issue and Defendant's violation of the NDA also arose from events taking place in Nevada. Although Plaintiff is not a Nevada citizen, for the reasons mentioned above, venue was originally proper in Nevada. Thus, the court may but is not required to transfer the case.

B. Transfer

The court may transfer for convenience sake. The case is already being heard in Nevada between the parties at issue, and the primary defendant is a Nevada citizen. Since Plaintiff has purposefully availed to Nevada, there is no indication that hearing the case there is inconvenient. Although 3P may wish to hear the case in Arizona, at most this is only convenient for 3P. 3P will argue that the planned event is to take place in Arizona and as such it is more convenient to hear the case there. However, as mentioned, venue was originally proper and the court should only transfer if it is more convenient elsewhere. On balance, two of the three parties likely feel that Nevada is sufficiently convenient for the case, so the case should remain in Nevada.

*Conclusion -*

The Court should decline to transfer venue in this case.

VI. The federal court of appeal may hear Plaintiff's appeals

*Rule -*

Normally, appeals are not ripe until there is a final judgment in the case. A final judgment is typically considered a ruling following a meaningful hearing on the matter. In certain cases, the appellate court may hear so-called interlocutory injunctions, or those that are allowed to be heard before final judgment has been issued by the lower court.

*Application -*

Plaintiff has appealed on two issues: (a) the preliminary injunction and (b) the motion to remand. Under the federal rules, both are immediately appealable to the proper appellate court (that encompassing the District Court). Each may be heard by the 9th Circuit here, since that is the appellate court which encompasses the District Court for Nevada on these facts.

*Conclusion -*

The court may entertain the appeal brought by Plaintiff as to both motions.

**\*\*\*\*\* Question 5 ENDS HERE \*\*\*\*\***



**JULY 2019  
EXAMINATION ANSWERS**

**APPLICANT'S ANSWERS TO QUESTIONS  
NEVADA BOARD OF BAR EXAMINERS**

**QUESTION \***

### Exam Information

Exam Date:

7/2019

Exam Name:

Question 6

\*\*\*\*\* Question 6 STARTS HERE \*\*\*\*\*

### 1. Termination of Inside NV Gym Contract:

Generally for a claim to be brought under the U.S. constitution there must be state action. Here the state enacted legislation and thus this requirement is met.

Under the Contract Clause of the U.S. constitution, a state may not enact legislation that would substantially impair a parties previously executed contracts absent proper justification. If the states legislation would interfere with private contracts the court will apply a form of intermediate scrutiny. If the states legislation would interfere with public contracts to which the state is a party, the legislation will be analyzed using strict scrutiny.

Here the state is a party to the contracts which the legislation interferes with, thus strict scrutiny will be applied and the state must show that the legislation advances some compelling government interest and the legislation was narrowly tailored to meet that interest, meaning there were no less burdensome alternatives to achieve the interest. Generally saving money or budgetary issues are not sufficient compelling interest for the state to use. Here the states interest is in promoting gym safety and sanitation as a result of the complaints they received regarding injuries and unsanitary conditions. The state enacted legislation that would promote sanitation and safety and thus has an interest in complying with its own statutes. They are promoting the health, welfare, and safety of its citizens.

Here the termination of Inside NV contract in order to accept new bids with the new safety regulations in mind is promoting that compelling interest and is doing so in a way that is narrowly tailored to meet that interest. NV inside gym can still submit a bid after they have shown that they have complied with the new safety regulations, they are not precluded from doing so. We are also unsure of when their contract was set to end originally, and it may be that they do not have a legitimate expectancy in that contract continuing and thus the interference would be slight.

Inside Nv will argue that they expected for the contract to continue and that they should be allowed to meet the new standards without having to terminate the contract and re-submit a new bid.

The state can argue that the contract was never meant to continue and the issuance of new state-owned gym licenses only happens periodically, so there is not substantial interference.

Because there is a compelling interest in the health and safety of the citizens and in complying with new safety standards. And because Inside NV will be permitted to submit a bid again, the court will likely find that this interference meets strict scrutiny and is thus constitutional.

The Inside NV gym could potentially also argue that they were denied procedural Due Process when their rights under the contract were taken away, if they could show that they had a legitimate expectancy interest in the contract continuing. To show a violation of due process they could argue that they should have had notice of the termination and should have been afforded a hearing and an opportunity to be heard on the issue. It is unlikely however that the gym can show that they had a legitimate expectancy interest in the contract under these facts, and thus a procedural due process argument would likely fail.

### 2. Fee Charged to Outside NV Gym for license

The fee charged to Outside Gym for a license is likely constitutional as well. Outside gym will argue that the fee is a violation of Privileges and Immunities clause which provides that states cannot discriminate against out-of-state residents in regards to substantial economic interests such as the right to earn a living, and other fundamental rights absent proper justification. However the privileges and immunities clause only applies to individual citizens and not business entities and thus Outside Gym would not be able to bring this claim on their own. However the owners of Outside Gym could bring the claim in their individual capacity. The individual owner would argue that charging such a high fee infringes on their right to earn a living. The state must then show that there is a substantially important government interest in charging a higher fee for non-resident licenses and that the fee charged is proportional to furthering that interest. As discussed below the important interest would be to protect the health and safety of the citizens of the state. The state will argue that the fee charged is necessary to further that interest because the costs of approving out-of-state licenses is that much higher because of the extra time and resources expended. The owner of the out of state gym could argue that the fee is disproportional to the extra work that actually needs to be done, and may be able to prove that the fee is not reasonable given the actual cost. We dont have these facts, but this could be a winning argument for the out of state licensee. However under the facts that we are given the fee seems to be necessary the the interest furthered is substantially important enough. Thus the fee is likely constitutional under the Privileges and Immunities Clause.

The company could also argue that the fee charged unduly burdens interstate commerce by making it more difficult for out of state commercial entity's to operate in the state. If a statute unduly burdens interstate commerce then Congress can regulate it under the Dormant Commerce Clause. To show that the regulation is constitutional the state must show that the benefits of the legislation outweigh the burden on interstate commerce. Here the state will argue that the burden of paying a higher fee is outweighed by the benefits and substantial interest in the health and safety of the citizens of the state. They will also argue that the fee is proportional to the work that needs to be done to verify whether the out-of-state company meets the safety, sanitation, and instructor certification requirements of the state, because these things take extra time and resources from the state. They can also argue that the companies are not prohibited from operating in the state and charging a licensing fee that is 5x the amount of the state licensing fee is not unduly burdensome.

### 3. Rejection of Outside NV Gym bid to operate state-owned Gyms;\_

The Rejection of Outside Gyms bid to operate a state-owned gym on the basis that they are an out of state resident is likely constitutional because the state is acting as a market participant. Congress has the ability to regulate interstate commerce under its commerce clause power. The states are allowed to regulate local commerce as long as the regulations do not discriminate against out of state commerce or unduly burden interstate commerce. Here the legislation expressly discriminates against interstate commerce by not allowing out of state gyms to operate state owned gyms within the state. If the legislation discriminates on its face then the state must show that the legislation furthers an important noneconomic government interest and is narrowly tailored to further that interest.

Additionally where the state is acting as a market participant they are permitted to discriminate against out-of-state business in favor of local business. Here the state is operating as a market participant because it is issuing contracts to private entities to operate gyms that are owned and subsidized by the state. Thus, they will argue that although their practice discriminates against out of state companies, they are permitted to do so as a market participant.

Therefore the practice of affording licenses to in state applicants only is likely constitutional.

4. Denial of Bruce's Application for employment with State-Owend Gym.

The Denial of Bruce's application for employment with the state owned gym was likely unconstitutional and a violation of Bruce's rights under the Equal Protection clause of the 14th amendment. Under the equal protection clause the states may not discriminate against classes of people based on their class, absent the appropriate justification.

Here Bruce is an alien, although he is a lawful permanent resident. Generally the states may not discriminate against people based on their alienage and any discrimination based on alienage is subject to strict scrutiny (state must show a compelling interest and no reasonable less discriminatory alternative). However there are exceptions to the strict scrutiny requirement when the state is discriminating against aliens in the context of employment with the state that directly affects the democratic process. The Supreme Court has held that States are able to discriminate against non-u.s. citizens if they are applying for jobs with a direct and substantial relationship to the democratic process such as police officers, public officials, and school teachers. The state may not broadly deny Aliens opportunities for employment with the state government where the jobs do not involve the democratic process.

Here Bruce is applying for a job with the state to work at a gym. This job does not have any effect on the democratic process and thus the denial of a job to Bruce would fall under strict scrutiny. The state would need to show that they have a compelling interest in denying non citizens public employment and that there is not reasonable alternative to furthering that interest that is less discriminatory. Here there is no compelling interest in keeping a state job at a gym from non-citizens. This is not like teaching where the state is afraid that the non-citizen beliefs will be transferred and taught to young americans, affecting how they view the democratic process. This is a job as a fitness instructor where there is no substantial risk of influence because generally the people that the instructor would be training are adults (not malleable children).

Thus, the denial of the job to Bruce likely violated the Equal Protection clause and the Nevada statute that limits employment with the State to U.S. citizens is likely unconstitutional because it is overly broad.

\*\*\*\*\* Question 6 ENDS HERE \*\*\*\*\*



**JULY 2019  
EXAMINATION ANSWERS**

**APPLICANT'S ANSWERS TO QUESTIONS  
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**QUESTION +**

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Exam Date:

7/2019

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Question 7

\*\*\*\*\* Question 7 STARTS HERE \*\*\*\*\*

Answer to Question 1 and 2

Under the Doctrine of Accomplice Liability, co-conspirators in the course of the crime are held liable for the actions of the other conspirators. As such Adam and Bill will both be held liable for the actions committed by either of them during their commission of the crime.

Conspiracy- (specific intent crime) A conspiracy occurs when two or more people communicate the intent to commit an unlawful act. In Nevada, an overt act is not required. Solicitation is the crime of attempting to induce another to commit an unlawful act. Here, Adam was soliciting Bill into shoplifting. Upon Bill's acceptance to go along with unlawful act of shoplifting, Adam's solicitation merged into a conspiracy, and both would be criminally liable for conspiracy because they both communicated an intent to commit the unlawful act of shoplifting.

Burglary- (specific intent crime) Common law defines burglary as the trespassory breaking and entering, into the dwelling home of another, at night, with the intent to commit a felony. NV is distinct from common law, in that under NRS burglary is defined as the trespassory breaking and entering into the dwelling, or protected structure of another with intent to commit a felony, grand or petty larceny, or any unlawful act. NV removed the element of night and extended the scope to include commercial structures. Here, the element of breaking and entering may be contested because Adam and Bill entered a convenience store which was open to the public including Adam and Bill. Thus, it would indicate that there was no need to break into the store, but the statute speaks to the barrier of the premise and the trespassory intent to cross pass that barrier. As such, on counterargument, the defendant's intentions to commit a crime within would suffice to evidence that their ill intent was unconsented and therefore, by entering the building with such intent they were trespassing and satisfied the first element. Next, in NV, the entry had to be into a protected structure. Here, the store would be considered a protected structure. Lastly, there is a requirement of intent to commit one of the mentioned crimes. Adam specifically stated that the intent was to shoplift cigarettes. This is considered petty larceny as cigarettes are worth \$650 or less. Therefore, both Adam and Bill would be criminally liable for burglary.

Aggravated Assault- (specific intent crime) Aggravated assault in NV, is defined as the intentional placement of another in fear or apprehension of imminent harm with a deadly weapon; or attempted battery with a deadly weapon. Here, Adam upon entering the store, yelled out "No body move and no body gets hurt" as he pulled out his gun. For assault to be evident, the victim must actually be able to witness the threat. Here Carl, saw the two enter and it's reasonable to confirm that he heard the statement as he began reaching for something under the desk and stopped when Adam threatened him once more. As such Adam would be criminally liable for aggravated assault, and Bill would be as well under the doctrine of accomplice liability.

Attempted Robbery- (General Intent) Attempt (specific intent) is the steps taken in furtherance in the commission of a crime, mere preparation is not enough. Robbery is the trespassory taking of property, from another, with the threat of physical force to the person. Here, Adam took the steps to further his commission of a robbery by entering the store, yelling at Clark not to move, and brandishing a gun. Robbery did not occur though, as the facts do not indicate that either Adam or Bill were successful at taking any property with them as they ran away at the first sign of police. Therefore, Adam would be criminally liable for the attempted robbery, and Bill would be as well under the doctrine of accomplice liability.

First Degree Murder; Felony Murder- (specific intent) First degree murder is defined as the unlawful killing of another human being with malice and forethought. Felony murder is also consider a first degree murder when a human is killed during the commission of an enumerated dangerous crime (robbery). Here, Adam in an attempt to scare Carl into submission fired his weapon into the ceiling, striking the tenant who lived above killing. Adam fired the weapon during the course of the attempted robbery, and would thus, have committed the killing during the commission of an enumerated dangerous crime. Adma would argue that he did not possess the required intent to kill, as he was not aiming at Carl and was shooting to scare Carl not harm anyone. The prosecutor would not have to prove the element of intent to murder, but rather identify whether it is foreseeable that due to the actions of the defendant a person could be killed. Here, it would be foreseeable that firing a gun blindly into a ceiling (of a multi-level building) could kill someone. As such, because there is foreseeability, Adam would be criminally liable for felony murder of the tenant. Bill would be also liable under the doctrine of accomplice liability.

Bills Defense- First Degree murder is a specific intent crime. Specific intent crimes are permitted two additional defense, voluntary intoxication and unreasonable mistake of fact. Bill may have an argument that because he was so mistaken as to what was to occur inside the store, that he should be able to allowed the defense of mistake of fact. It is unlikely that Bill would be successful.

#### Bills attempted Repudiation

A repudiation may occur when a co-conspirator has a change of heart and no longer wishes to participate in the crime. For a repudiation to be adequate to relieve the liability, the actor must expressly state their intent to repudiate, and must take substantial step to negate any benefit they have provided to the commission of the crime. A repudiation may suffice to relieve liability of the crime but not of the conspiracy itself. Here, Bill attempted to repudiate himself from the crimes as Adam went beyond the scope of what Bill intended to happen. Bill expressly stated that he did not sign up for this crime, but Bill performed no act to negate his actions in the crime. As such, Bill's repudiation would fail.

#### 3. Bills Statement against Bill

Here, the facts state that Adam and Bill are being tried for their crimes together. This is important as it will likely change the outcome of the answer. Bill made his statement in the police car, after being detained. No Miranda warning was issued. (No miranda was necessary because although they were not free to leave (they were arrested), the officer's were not conducting any form of interrogation and Bill voluntarily produced his statement.) Because a Miranda warning was not necessary, Bill may not assert a Miranda Violation defense for this reason.

Under the Confrontation Clause, a defendant is permitted to cross-exam a witness whose testimony is being offered against them. Here, prosecution intends to show this video from the police vehicle to show that both defendants were in the store. As such, confrontation clause would not apply as there is no witness to cross-exam as Bill was the speaker.

Therefore, because Bill voluntarily made the statement, and no defense applies to restrict its entry, the statement would be admissible against Bill. Because the statement also pertains to Adam, and Adam and Bill are being tried together, this would violate Adams confrontation clause, will be discussed below, therefore, if this evidence is permitted, the defense would have to ask that the judge provide jury instruct to only use the evidence in their determination of Bill and not Adam. As this is very difficult for a jury to ignore something they are told is true, Adam may seek to seperate from Bill to protect his rights.

#### 4. Bills Statement against Adam

Although Bill's statement would likely be permitted against Bill, it likely would not be permitted against Adam because Adam has a claim under the Confrontation Clause.

Under the confrontation clause, a defendant is permitted to cross-exam a witness testifying or providing testimony against them. Here, prosecution intends to provide Bill's statement against Adam but Bill has envoked his 5th amendment right against self incrimination and refused to take the stand. If Bill does not take the stand, then Adam is not given the opportunity to cross-examine Bill about his statement. Therefore, the lack of opportunity to cross-examine the witness would violate Adam's right to confrontation. Therefore, prosecution would have to refrain from using said evidence and would be required to prove their presence at the scene another way.

Thus, Bill's statement would violate Adams right to confrontation and would not be admissible against Adam.

\*\*\*\*\* Question 7 ENDS HERE \*\*\*\*\*



**JULY 2019  
EXAMINATION ANSWERS**

**APPLICANT'S ANSWERS TO QUESTIONS  
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**QUESTION ,**

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Question 8

**\*\*\*\*\* Question 8 STARTS HERE \*\*\*\*\***

As this action is before Nevada state district court, the Nevada rules of evidence govern.

Overarching to each of these offered pieces of evidence is whether they are relevant, which is defined as being probative and material. Probative evidence tends to make the purpose for which it is asserted more true than absent the evidence, while material evidence means it is of consequence in the case. Just because evidence is relevant, however, does not mean it is admissible. As a general rule, its probative value must also not be substantially outweighed by its prejudicial effect

### 1. Photocopy

At issue is whether the photocopy of the PSA is admissible. The PSA is at issue in this action and therefore relevant. Moreover, there is nothing prejudicial about it.

A PSA is a form of documentary evidence and therefore must be properly authenticated in order to be admissible under the Nevada evidence rules. A document can be authenticated in numerous manner depending on the type of document. As a contractual agreement, the document's authenticity may be satisfied by testimony by a person with personal knowledge of the document. Gemma, as a party to the contract, would be able to thus authenticate it.

Here, however, the concern is that the document is not the original but rather a photocopy. This conceivably can raise concerns both for authentication, as well as the "best evidence rule," which requires the original document to be produced when testimony is relying on the contents of the document, or else the document's contents are reasonably in question. Photocopies as a mechanically produced and reliable duplicate constitute the original document for the purposes of these rules. Whether Gemma "misplaced" the original would only come into play to the extent Liam challenged the accuracy of the photocopy (e.g. was it tampered with, is it a different contract altogether, etc.). Moreover, the mere act of misplacing the original does not diminish the legal effect of the underlying document. In this case, there are no facts indicating Liam disputes the contents of the duplicate of the PSA. Liam's objection should therefore be denied.

### 2. Testimony from the Ranch Foreman

At issue is whether the Ranch foreman's testimony is admissible. Gemma seeks to introduce evidence that, after the PSA was signed, Liam instructed the Ranch foreman to stop providing supplemental feed to the grazing cattle. This testimony is relevant to whether Gemma obtained the bargained for promise, and it is not prohibitively prejudicial.

The larger concern is whether it is admissible under hearsay. Hearsay is an out of court statement by a declarant offered to prove the truth of the matter asserted. In order to protect the judicial efficacy of trial, Nevada law (and elsewhere) typically prevents hearsay statements from being admissible. There are exceptions to this general rule, however.

Here, the Ranch foreman's testimony would not fall under hearsay because Liam's instruction is a party opponent admission. Under the party opponent admission rule (which is categorized as not a hearsay statement), courts may admit statements made by the opposing party to the instant action. These statements can either be express or adoptive depending on the circumstances. Per the facts, Liam was the one directing the foreman to stop feeding the cattle. This would therefore be a party opponent admission and admissible. Liam's objection should therefore be denied.

Even to the extent party opponent admission did not apply, however, Gemma could argue that the statement constitutes a statement against interest because it is a statement made that a reasonable person would not make unless it were true because of the implicating criminality of the statement. In Nevada, these statements also extend to those that would be demeaning or publicly ridiculed. As not feeding cattle might implicate some criminal liability for animal abuse, this statement might facially fit the exception. Statements against interest are only admissible if the declarant is unavailable at trial, however, and there is no indication that is the case here.

### 3. Testimony/Documents re: tax evasion

Prior acts are inadmissible to show that a person acted in accordance with those prior acts. If Gemma were to offer these as "propensity," then the court should sustain the objection in favor of Liam. Prior acts may only be admissible if they go to an essential element of the claim or are offered for non-propensity purposes (e.g. motive, intent, absence of mistake, identify, common plan). Here, instances of tax evasion cannot come in to show that Liam broke the contract agreements here.

They may be able to come in, however, as impeachment evidence to impeach the credibility of the witness. In Nevada, evidence of prior crimes concerning fraud or deceit are admissible for impeachment purposes subject to the standard probative value test. The problem with Gemma's evidence is that it is not a conviction, but rather Liam's ex-wife's own testimony/documents regarding purported tax evasion. Admissibility must be shown by a preponderance of the evidence to the judge, and that is not satisfied here.

The documents do contain relative and probative material regarding Liam's misrepresenting of the inventory of cattle, however. As this is a central issue in the case, this portion of the documents (without the tax evasion) could be potentially admissible. Liam may object under the rule of completeness if in fairness the documents should be considered in their full context, but that does not seem at issue here. Regardless, for the purposes currently offered, the judge should sustain Liam's objection.

One final wrinkle is that Liam could argue his ex-wife cannot testify against him because of privileges. There are two privileges in Nevada regarding spouses -- spousal privilege and marital privilege. For both, the statements must have been made and concerning the period of marriage. Here, it does not say when the purported tax evasion occurred, but that fact could be dispositive of privilege. Additionally, the testifying spouse holds the privilege and therefore Liam cannot prevent his spouse from testifying. With respect to marital communications, the tax evasion documents are unlikely to be considered statements made "in the sanctity of marriage."

### 4. Recorded Deed

The recorded deed is relevant to this case because it shows that Liam sold upstream water rights that then resulted in "very little water" flow for Gemma despite Liam's prior representation. Additionally, nothing about the evidence is innately probative.

As to admissibility, recorded deeds are self-authenticating official documents and therefore may be admitted even absent additional foundation. As discussed above, as a copy, it will be treated like the original absent additional contesting. To the extent any foundation is required, a statement by the record clerk would authenticate. The deed additionally falls under the public records hearsay exception. Liam's objection should therefore be denied.

### 5. Gemma's Accountant Testimony

Gemma seeks to introduce testimony from her accountant regarding lost profits due to the number and condition of cattle. Nevada recognizes a client-accountant privileged relationship. As Gemma holds the privilege, however, she is entitled to have her accountant testify in that respect.

As to the contents regarding lost profits, such testimony would appear to implicate skill beyond mere observation of a lay person. Thus, the accountant would need to be admitted as an expert in order to testify. To determine expert qualification, the judge looks to (i) the experience, skill, education, specialized knowledge, etc. of the witness; (ii) whether they relied on sufficient data; (iii) whether they used scientifically recognized methods and principles; and (iv) whether they applied those principles to the facts of the case. This determination is made by the judge and must be shown by a preponderance.

Here, the accountant likely meets all these requirements as a professional in his field. Notably, the facts indicate that he relied on the data (lost profits/condition of cattle) in calculating the damage. Liam could argue that the lost profits are too speculative, but that would be unlikely to prevent admission of the evidence on direct. Liam's objection should therefore be denied.

#### 6. Email Printouts

These emails are relevant to show that Niles breached the contract and are not probative. Email printouts are documentary evidence. As documentary evidence, they must be authenticated. Mechanically printed out copies of the emails will be treated as appropriate duplicates (and thus as originals). Moreover, Gemma may testify as to their authenticity. Also, the emails contain Niles' digital signature and therefore are self-authenticating. Niles may argue the printouts are barred by parole evidence, but evidence of contract formation is not prevented under this theory. Niles' objection should therefore be denied.

#### 7. Offer to sell to another for 20k

Testimony from the real estate developer regarding Niles' purported offer to sell the small pond for 20k is likely inadmissible. Although the statement to the receptionist would be a party opponent admission, the receptionist is not the one being offered to testify. Rather, the real estate developer is the one testifying. Each layer of hearsay must fall into an appropriate exception. In this case, the real estate developer relaying what his secretary told him would not fall into an exception, unless he observed/heard the statements personally.

Moreover, it is questionable whether the evidence is relevant. At issue is the breach of the agreement with Gemma. Niles argues that there is no contract because no agreement was signed in accordance with the statute of frauds for the sale of real property. The fact that Niles offered to sell the property to someone else for 20k later thus does not inherently show that Gemma breached.

Gemma can argue, however, that the 20k shows a motive for Niles to repudiate the contract (because of the better price). This is a strong argument, as prior acts are admissible to show a party's motive. Absent the hearsay issues, this evidence could come in. As is, the objection should be granted.

#### 8. Satellite Photo

The satellite photo is documentary evidence and therefore must be authenticated. It is relevant because it shows the at-issue property, and is not prejudicial. The satellite photo came from the county website. A court may take judicial notice of facts whose truth is not in question and can be readily verified. Courts in Nevada have extended this to documents. Thus, the court may (on its own or upon request) take judicial notice that the satellite images come from the official county website and therefore are proper adjudicative facts to take notice of. In addition, the photo may be authenticated using the internet time-capsule preserver, which has been recognized for producing admissible forms of internet pages. If Niles has the photograph itself, then this may be authenticated by anyone with personal knowledge that it is what it purports to be. Niles' objection should therefore be denied as to this evidence.

\*\*\*\*\* Question 8 ENDS HERE \*\*\*\*\*



### Exam Information

Exam Date: 7/2019

Exam Name: MPT

\*\*\*\*\* MPT STARTS HERE \*\*\*\*\*

Carl Rucker seeks to dispose of his house in a way that allows his wife to live there for the rest of her life; assures that his sons receive the house after she dies; and minimizes the risk of litigation between them. Mr. Rucker assumes, and so should we, that his current wife and his two sons will not be able to agree to anything, and may be inclined to litigate. The two possibilities to which Mr. Rucker is open are granting a life estate to Mrs. Rucker, with a remainder in his sons; and contracting with his wife to write mutual wills leaving the house to the sons after both he and Mrs. Rucker have died. This memo will address the advantages and disadvantages of each approach.

### Life Estate

A life estate is an interest in land that gives one person, the life tenant, the right to possess the land for that person's life; the person who takes after has a remainder interest (Walker's Treatise on Life Estates at 7). The life tenant is entitled to both possession and all rents from the property should the rent it to another, but they are also responsible for the property's upkeep, including real estate taxes, insurance, and maintenance costs (Walker at 7).

A life estate limits what the life tenant can do with the property. Although a life tenant can transfer their interest, they can only transfer so much as they have, unless further empowered to sell or mortgage the full estate by the deed or will that created their interest (Walker at 7). A life tenant must also not commit waste, and may be liable to the remainderman if she does so (Walker at 8).

A life estate can be created either while the owner is alive or in the owner's will (Walker at 9). In the former case, the real property will pass at the death of the last life tenant to the remainder owner, with no need for probate (Walker at 8). However, deeding the property during the owner's life is irreversible unless all grantees consent (Walker at 8). On the other hand, if the life estate is only created by the owner's will, the court in probate could simply award the value of the life estate to the life tenant instead of possession of the property (Walker at 8).

A life estate presents distinct advantages for Mr. Rucker's needs. It would give Mrs. Rucker relatively free use of the property while she lives, while ensuring that his sons take the house upon her death. Although Mrs. Rucker would be obligated to maintain the property, at a cost of at least \$1700 per year for property taxes (Transcript at 3) plus insurance and any additional costs to maintain the house, Mr. Rucker is prepared to ensure she can afford that by leaving her \$200,000 when he dies (Transcript at 4). With her additional Social Security income, she should be able to maintain the house, as would be her obligation as a life tenant.

The life estate does raise the spectre of litigation in an action for waste, allowing the sons to sue Mrs. Rucker if they believe her actions harm or neglect the property. However, as long as she properly maintains it, she should be able to avoid liability.

The life estate can be created either while Mr. Rucker is alive or in his will. The former fits Mr. Rucker's desires much better - it avoids probate (time consuming and expensive), and also ensures that a probate court doesn't decide to simply award Mrs. Rucker the value of the life estate (See Walker at 8). However, granting a life estate while he is alive will almost certainly be irrevocable. Mr. Rucker would not be able to revoke that deed without the joint consent of Mrs. Rucker and his two sons, something that will likely never happen. So before he decides on this course of action he must be sure this is what he wants.

Regarding Mrs. Rucker's elective share, Franklin law allows a spouse to ignore a grant in a will and choose to take her elective share instead. A spouse married for 15 years or more is entitled to a 50% elective share of the their spouses's "augmented estate" (In re Estate of Lindsay at 9). The augmented estate consists of the net assets held in probate, the assets transferred by the decedent to their spouse

before death, and the surviving spouse's own assets and pre-death transfers (Lindsay at 9). The value of a life estate is included in the augmented estate (Lindsay at 9), but that property is not part of the probate estate (Walker at 8; see also Lindsay at 10).

Here, Mr. Rucker's total assets appear to be the house and the \$200,000 in certificates of deposit (Transcript at 3). The house is currently valued at \$250,000 (Appraisal Memorandum at 5), and the life estate is worth approximately \$80,000 at this point in time (Appraisal at 5). That value might change depending on Mrs. Rucker's age when Mr. Rucker dies, but for the purposes of these calculations we can assume that that is its value. Estate tax is also not an issue (Transcript at 3). Mr. Rucker intends to leave the certificates to Mrs. Rucker (Transcript at 4). Therefore, if Mr. Rucker granted the life estate before his death and these values remained the same, then at his death the net probate estate would consist of only the certificates, valued at \$200,000. The augmented estate, however, would consist of at least \$280,000, the value of the certificates plus the life estate. Mrs. Rucker would at her option be able to choose to take under the will (giving her the full \$280,000) or to take her 50% share of the augmented estate, or \$140,000, for which she would keep her \$80,000 life estate and be able to take an additional \$60,000. It's hard to imagine her choosing the elective share if she stands to inherit everything, but it is her option.

Note, however, that although Mr. Rucker has stated his intent to leave all of the certificates to Mrs. Rucker, it might be a good idea to leave some to his sons, in order to limit litigation over the will and perhaps ease future friction between them and Mrs. Rucker. Under the analysis above, Mr. Rucker can leave up to \$140,000 to his sons without giving Mrs. Rucker any incentive at all to take her elective share. That might be a little much, since he does need to leave Mrs. Rucker enough to maintain the property, but it's something worth discussing with the client.

Another thing to consider is that if Mr. Rucker transfers the life estate to Mrs. Rucker while he is alive, she would have the ability to kick him out. In addition, if she pre-deceased him, his sons would then have the ability to kick him out. This does not appear to be a concern of Mr. Rucker's, but it's certainly something we should discuss with him. One solution would be to grant himself a life estate, with a remainder in life estate to his wife, with a remainder in fee simple to his sons.

### Mutual Wills

Mr. and Mrs. Rucker may in the alternative contract to enter mutual wills, in which each leaves their property to the other, or in the event that the other died first to the sons. One risk here is that Mr. Rucker may die first, and Mrs. Rucker may then seek to revoke her will and make a new one disinheriting the sons. The other risk is that Mrs. Rucker might in such a case transfer the house rather than let the sons have it.

There are two ways to do this: either a contract to make a will, restricting the right of the surviving spouse to alter a testamentary disposition, or a joint will (Manford v. French at 12).

A contract to make a will may be enforceable to prevent the survivor from changing the will, but it does not restrict their ability to transfer or encumber the property during their lifetime (Manford at 12). This makes it a bad option for Mr. Rucker, since it would give Mrs. Rucker the ability to transfer the house if Mr. Rucker dies first.

The other option is a joint will or mutual will. A joint will reflects a contractual agreement between two parties, in which the testators make mirror-image dispositions of their property (Manford at 12). Franklin law requires that such an agreement be in writing (Manford at 12-13). However, the joint will has the same problem as the contract to make a will - it only controls the disposition of property in the will. For this to achieve Mr. Rucker's purpose, the contract between the two of them would have to contain some further restriction preventing Mrs. Rucker from selling or encumbering the property. Such a restriction would not be without risk, since if Mrs. Rucker

breached by transferring the property, Mr. Rucker's sons may only be able to obtain money damages. Mr. Rucker's sons don't need the money (Transcript at 4); they just want the house to remain in the family (Transcript at 4). This makes both mutual will options unappealing.

Assuming that Mr. Rucker followed one of these options and that at his death he still had the same property, worth the same as now, the effect on the elective share would be as follows. The net probate estate would contain the house, worth \$250,000, plus the certificates, worth \$200,000, for a total of \$450,000. Mr. Rucker's will would presumably leave \$200,000 in certificates to Mrs. Rucker, plus the house, for the entirety of his estate worth \$450,000. Assuming no other property transfers, Mrs. Rucker's augmented estate would be the same. Mrs. Rucker would be entitled to instead claim an elective share of the estate, in the amount of \$225,000 (50%, as discussed in the previous section), but she almost certainly wouldn't. Mr. Rucker could if he chose leave up to \$200,000 to his children in this will without giving Mrs. Rucker any incentive to take her elective share instead.

### Conclusion

The better option for Mr. Rucker is probably to execute a deed giving Mrs. Rucker a life estate, with his sons a remainder interest. If he is certain he wants to do this, he should execute it while he is alive, since that avoids probate and the risk that a court might eliminate the life estate by awarding money instead. Mrs. Rucker should be fully capable of maintaining the property; the main risk is that the sons may engage in litigation over waste, or otherwise contest the disposition in the will. Giving them a limited number of the certificates, if that is what the client wishes, might ease future friction without risking Mrs. Rucker claiming her elective share.

\*\*\*\*\* MPT ENDS HERE \*\*\*\*\*